

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLEE

723

IN THE
United States Court of Appeals

DISTRICT OF COLUMBIA.

*United States Court of Appeals
for the District of Columbia*

No. 9664 FILED JAN 12 1948

Joseph W. Stewart
CLERK

PAUL FILSON and ANNA F. FILSON, his wife,
Appellants.

v.

ANNA M. FOUNTAIN, *Appellee.*

**Appeal from the District Court of the United States for the
District of Columbia.**

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INDEX.

	Page
Counter Statement of Case	1
Summary of Argument	5
Argument	6
I. In New Jersey When Deeds Are Executed for an Express Consideration Habendum to the Use of the Grantee There Can Be No Resulting Trust in Favor of the Grantor	6
II. The Deed and Option Did Not Make Appellants Mortgagees in a Third Mortgage on the Property for \$6,000	11
III. The Court Lacks Jurisdiction of the Subject of the Action	14
IV. Substitution of the Administratrix of the Estate of Brainard Fountain Was Properly Denied.....	14
V. In Any Event Appellants Are Not Entitled to a Judgment in This Court.....	15
Conclusion	18

CITATIONS.

Table of Cases.

Brown v. Murray (N. J. Ch. 1922), 94 N. J. Eq. 125, 118A. 534	10
Columbia Nat'l. Sand Dredging Co. v. Morton (1906), 28 App. D. C. 288.....	14
Commonwealth Trust Company v. Smith (1924), 266 U. S. 152, 45 S. Ct. 26, 69 L. Ed. 219.....	15
Down v. Down (N. J. Ch. 1912), 80 N. J. Eq. 68, 82A. 322	8, 9, 10
J. W. Pierson Co. v. Freeman (N. J. Err. & App. 1933), 113 N. J. Eq. 268, 166A. 121.....	11
Surge v. Lemberger (N. J. Err. & App. 1921), 92 N. J. Eq. 656, 114A. 454.....	9
Trenton Banking Co. v. Howard (N. J. Ch. 1936), 187A. 569, Aff'd. 121 N. J. Eq. 85, 187A. 575.....	13, 14

Rules.

56 F. R. C. P.	15
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No. 9664.

PAUL FILSON and ANNA F. FILSON, his wife,
Appellants.

v.

ANNA M. FOUNTAIN, *Appellee.*

BRIEF FOR APPELLEE.

COUNTER STATEMENT OF CASE.

In their amended and supplemental complaint appellants asked the Court to impress a resulting trust on a residence in Englewood, New Jersey, then owned by Brainard Fountain, since deceased, and his wife, the appellee, Anna M. Fountain, by the entireties (Jt. App. 2-6 inc.).¹ The ap-

¹ Brainard Fountain was originally a defendant. He died during the pendency of this suit (Jt. App. 10). The District Court refused to substitute his administratrix as a party to the suit so that Mrs. Fountain was the only defendant at the time of the judgment in the District Court and is the only appellee (Jt. App. 13). Brainard Fountain was the brother of the appellant Paul Filson who changed his name in an adoption proceeding (Jt. App. 14).

pellee made a motion for a summary judgment in the District Court and it was granted (Jt. App. 11, 14).

In their brief here, appellants claim a resulting trust (App. Br. 18), but seem to place their main reliance on cases in which deeds have been held to be mortgages (App. Br. 21-25 inc.). Their brief does not make clear whether they think these cases state a doctrine which is an exception to the rule in New Jersey that where a deed recites an express consideration with habendum to the use of the grantee there can be no resulting trust in favor of the grantor, or whether they are now for the first time urging a new ground of recovery. They say:

"The extent of the relief is specifically decision that appellants are entitled to recover \$6,000 secured by a lien on the property subject to enforcement if the recovery be not satisfied, or else it is the general relief as ascertainable from the complaint, the answer and the evidence." (App. Br. 26)

Whether appellants are claiming a resulting trust or on some other theory, the only pertinent facts of the case are these:

On December 24, 1937, the appellant, Paul Filson, owned the real estate in question. It was subject to a mortgage in the original principal amount of \$6,000 which he had given to the Englewood Mutual Building and Loan Association in August 1937 (Jt. App. 37). On December 24, 1937, Filson borrowed \$3,000 from his mother, Laura S. Fountain, for which he gave his bond secured by a second mortgage on the property (Jt. App. 38, 39). The bond was also signed by Filson's brother, Brainard Fountain, as additional security for their mother (Jt. App. 39).

The same day the Filsons deeded the property to the Fountains in consideration of the Fountains' agreement to assume and pay the two mortgages on the property. As part of this transaction an option agreement was executed by the Filsons and the Fountains (Jt. App. 40).

The deed recited an express consideration and granted the property to the Fountains

"TO HAVE AND TO HOLD, all and singular the above described land and premises, with the appurtenances, unto the said party of the second part, their heirs and assigns, to the only proper use, benefit and behoof of the said party of the second part, their heirs and assigns forever;" (Def. Exh. No. 8, Jt. App. 57)

The pertinent portion of the option agreement was as follows:

"BY THIS AGREEMENT made this 24th day of December, 1937, by and between Brainard Fountain and Anna M. Fountain, his wife, hereinafter called the Optionor, and Paul Filson and Anna F. Filson, his wife, hereinafter called the Optionee;

WITNESSETH THAT

"WHEREAS, the Optionee has this 24th day of December, 1937, conveyed the premises hereinafter described, to the Optionor in consideration of the assumption by the Optionor of two mortgages, which are now liens on said premises, and

"NOW, THEREFORE, In consideration of the premises and One (\$1.00) Dollar paid by the Optionee to the Optionor, the receipt whereof is hereby acknowledged, the Optionor does hereby give the Optionee first option for three years, from the date hereof, to repurchase the premises hereinafter described, for the sum of Nine Thousand (\$9,000.00) Dollars;

"AND it is further Agreed between the Optionor and the Optionee, that this option may be terminated upon payment to the Optionee of the sum of Six Thousand (\$6,000.00) Dollars in cash or certified check;" (Def. Exh. No. 9, Jt. App. 59)

The option was not exercised by either party.

The Fountains refinanced both mortgages after the expiration of the option agreement, relieving the Filsons from liability on both of them (Jt. App. 33, 34).

The appellants did not claim any interest of any kind in the property after the expiration of the option on December 24, 1940, until sometime in September 1945. In August 1945, the Fountains contracted to sell the property² and when this fact became known to Filson he called Brainard Fountain and asked what was going to be done about his (Filson's) equity in the property (Jt. App. 21). At that time Fountain denied that Filson had any claim upon the property. This was the only conversation they had about whether Filson had any equity in the property after the expiration of the option (Jt. App. 45, 46).

In the statement of facts contained in their brief, appellants recite at length certain facts relating to an agreement dated March 8, 1937, between Filson and Fountain relating to the same property. Filson and Fountain both testified that this agreement was abandoned (Jt. App. 17, 43). This is also shown conclusively by the documentary evidence.

Although Filson says that he did not agree to purchase the property from its prior owner until the agreement of March 8, 1937 with Fountain had been signed (Jt. App. 42, 43), his contract of purchase was dated March 4, 1937. Under it Filson was entitled to possession of the property May 1, 1937, but the sellers were not obligated to deliver a deed until June 1, 1937 (Def. Exh. No. 2, Jt. App. 48). The agreement of March 8, 1937, between Filson and Fountain provided that title to the property was to be taken in the name of Brainard Fountain on or before June 1, 1937, and that Filson was to advance Fountain \$3,000 to make improvements on the house. (Def. Exh. No. 3, Jt. App. 49). That advance was made. However, on May 10, 1937, Fountain paid back most of the advance (Def. Exh. No. 4, Jt. App. 52) and two days later Filson took title to the property in his own name (Def. Exh. No. 5, Jt. App. 52). Under their agreement of March 8, 1937, Fountain was to give Filson an eleven year mortgage in an amount not exceeding

² This contract was not completed (Jt. App. 20) and title to the property remains in the appellee.

\$10,000 containing terms spelled out in detail in the agreement (Def. Exh. No. 3, Jt. App. 49). No such mortgage was ever executed. On the contrary, in May 1937, Filson made application to the Englewood Mutual Building and Loan Association for a loan secured by a mortgage on the property. This loan was made to Filson who executed the mortgage in August 1937 (Jt. App. 37). Sometime in July 1937, Fountain moved into the house and the next month paid rent on it to Filson (Jt. App. 19, 37, Def. Exh. No. 6, Jt. App. 54). There is no dispute about the March 8, 1937 agreement having been abandoned and the evidence establishes no connection at all between these earlier transactions and the transactions which occurred on December 24, 1937.

SUMMARY OF ARGUMENT.

In New Jersey when deeds are executed for an express consideration habendum to the use of the grantee, there can be no resulting trust in favor of the grantor.

This case involves New Jersey real estate and concededly is governed by the law of New Jersey. Appellants' main claim is that circumstances of their transfer of the property to appellee and her husband were such as to create a resulting trust in the property in appellants' favor in the amount of \$6,000. This is the only theory advanced in appellants' amended and supplemental complaint. The fact is that appellants executed a deed to the property which recited an express consideration and which also granted the use of the property to the Fountains. The law of New Jersey is that a resulting trust cannot arise in favor of the grantor on such facts.

The deed and option did not make appellants mortgagees in a third mortgage on the property for \$6,000.

For the first time in their brief in this Court appellants seem to claim that the deed by which they transferred title to the property to the appellee and her husband and the option agreement executed at the same time, constitute a mortgage. In support of this position appellants cite cases in which grantors have been successful in having deeds of conveyance and accompanying option agreements declared to be nothing more than mortgages executed by the *grantors*. This, however, is not appellants' claim, which is that their deed of conveyance and the accompanying option agreement constitute a mortgage on the property for \$6,000 in which they are *mortgagees* and the grantees in the deed are *mortgagors*.

A mortgage, of course, is a pledge of property as security for an obligation. To establish that the deed and option agreement constitute a mortgage on the property for \$6,000 in which the Fountains were mortgagors and the Filsons were mortgagees, the Filsons must first establish that the Fountains had an obligation to pay them \$6,000. The contention that there was such an obligation is in direct conflict with the terms of the option agreement.

The court lacks jurisdiction of the subject of action.

If the deed and option constitute a mortgage for \$6,000 from the Fountains to the Filsons, then the appellants are really seeking the foreclosure of the mortgage and the Court does not have jurisdiction of the subject matter.

Substitution of the administratrix of the estate of Brainard Fountain was properly denied.

Appellee is the sole owner of the property and would be the only necessary defendant even if appellants could establish a resulting trust in the property.

In any event appellants are not entitled to a judgment in this court.

Appellants appear to ask for a judgment in this Court. The case was decided by the Court below on the ground that a grantor in a deed which conveyed the use of the property to the grantee could not claim a resulting trust. The appellee contends that the deed and the option themselves justify affirmance of the judgment in her favor as a matter of law. However, if the Court decides that this is not true, then the case should be remanded for a new trial because there is a conflict in the evidence as to facts which would be material if the deed and option are not controlling.

ARGUMENT.

I. In New Jersey When Deeds Are Executed for an Express Consideration Habendum to the Use of the Grantee There Can be No Resulting Trust in Favor of the Grantor.

In their amended and supplemental complaint appellants claim in substance that the circumstances of their transfer of the property to appellee and her husband created a resulting trust in the property in appellants' favor in the amount of \$6,000. They sought to have the Court declare this trust (Jt. App. 2).

Appellants concede that the case is governed by the law of New Jersey (App. Br. 18).

The pertinent facts are that on December 24, 1937, the appellant owned the property in question and on that date conveyed it to appellees for an express consideration by a deed which granted the use of the property to the appellees (Def. Exh. 8, Jt. App. 56). Under such circumstances the law of New Jersey is that the deed raises a conclusive presumption of an intention that the grantee is to take the beneficial estate, and destroys the possibility of a trust resulting to the grantor.

This rule was firmly established in New Jersey in *Down v. Down* (N. J. Ch. 1912) 80 N. J. Eq. 68, 82 Atl. 322. This was a suit to determine the title to real estate. The defendant filed a cross-bill seeking to establish a resulting trust in the property. The defendant was the husband who had been the absolute owner of the property in question. He conveyed it to one Percy R. Conner. Later, Conner, at the defendant's request, had conveyed the property to the complainant in the suit who was also the wife of the defendant. The conveyance from Conner to the wife was in form an absolute deed of conveyance with full covenants and declaration to the use of the grantee and an expressed money consideration. The only question in the case was whether the deed vested in the wife an absolute estate or whether she held title in trust for the defendant, her husband. In deciding that the wife held an absolute estate, the Court said:

"But, should it be thought that the views above expressed too closely confine the field of operation of resulting trusts, I think it is clear that the accepted doctrine that a resulting trust cannot arise in favor of a grantor, in the absence of fraud, under a deed of conveyance expressing a money consideration, with declaration to the use of the grantee, must be regarded as operative to deny relief to cross-complainant in this suit. This rule of law has been so frequently stated and applied that its amplification is unnecessary. Professor Pomeroy, in 3 Eq. Jur. § 1036, states the rule as follows: 'In all the instances belonging to this first form of resulting trust, the intention that the donee is not to enjoy the beneficial interest, but that a trust is to result, or the contrary intention, must appear expressly or by implication from the terms of the instrument itself by which the property is conveyed. If the instrument is a will, then no extrinsic evidence is ever admissible to show the testator's meaning, nor even to show a mistake. If the instrument is a deed, no extrinsic evidence of the donor's intention is admissible, unless fraud or mistake is alleged and shown. If, therefore, there is in fact no consideration, but the

deed recites a pecuniary consideration, even merely nominal, as paid by the grantee, this statement raises a conclusive presumption of an intention that the grantee is to take the beneficial estate, and destroys the possibility of a trust resulting to the grantor, and no extrinsic evidence would be admitted to contradict the recital, and to show that there is in fact no consideration, except in a case of fraud or mistake.' The text above quoted, and the cases of this state here cited, except from their operation, as already pointed out, instances in which property is purchased by one person and title is taken by him in the name of another. The text above quoted from Pomeroy is supported by the following cases in this state: *Baldwin v. Campfield*, 8 N. J. Eq. 891, 903; *Smith v. Howell*, 11 N. J. Eq. 349, 359; *Whyte v. Arthur*, 17 N. J. Eq. 521, 523; *Hogan v. Jaques*, 19 N. J. Eq. 123, 97 Am. Dec. 644; *Osborn v. Osborn*, 29 N. J. Eq. 385; *Stucky v. Stucky*, 30 N. J. Eq. 546, 554; *Lovett v. Taylor*, 54 N. J. Eq. 311, 34 Atl. 896; *Coffey v. Sullivan*, 63 N. J. Eq. 296, 303, 49 Atl. 520; *Aller v. Crouter*, 64 N. J. Eq. 381, 54 Atl. 426; *Holton v. Holton*, 72 N. J. Eq. 312, 65 Atl. 481; *Ashby v. Yetter*, 81 Atl. 730."

Down v. Down, *supra*, was followed in *Surye v. Lemberger* (Court of New Jersey Errors and Appeals, 1921) 92 N. J. Eq. 656, 114 Atl. 454. In that case the Court said:

"[1] A careful consideration of the testimony and of the well-defined legal principles applicable to the proof in the cause makes it manifest that no resulting trust was established in favor of Lemberger. For it is not pretended that the deed made by Lemberger conveying the Amherst street property to Miss Klein was either the result of a mistake on his part or of fraud practiced upon him, but, on the contrary, it appears that the deed of conveyance made by him was a voluntary act. By that act, Miss Klein, as against her grantor, became the owner in law and in equity of the Amherst street property. If Lemberger had filed a bill against his grantee to have a resulting trust declared in his favor, he could not, under the adjudged cases, have succeeded in his suit. How, then, can the complainants who stand in privity with Lemberger, by

contract possess any greater right than he, himself, has.

"In *Baldwin v. Campfield*, 8 N. J. Eq., at page 903, Elmer, J., in speaking for this court said:

" 'The trust which results from the mere fact that one person pays the purchase money of land conveyed by the seller to another is considered as coming within the exception in the statute of trusts which arise or result by implication or construction of law. But no trust arises upon a man's own deed; no matter whether there was in fact any consideration paid or not, as between the parties, a voluntary deed is just as binding as any other.'

"In *Down v. Down*, 80 N. J. Eq. at pages 74 and 75, 82 Atl. at pages 324 and 325, Vice Chancellor Leaming has collated the cases decided in this state dealing with the subject of resulting trusts, and a consultation of the cases referred to establishes that the doctrine enunciated in *Baldwin v. Campfield*, supra, is firmly rooted in our jurisprudence."

Down v. Down, supra, was again followed in *Brown v. Murray* (N. J. Ch. 1922) 94 N. J. Eq. 125, 118 Atl. 534. In that case, by a counterclaim in a partition action, defendants claimed that certain real estate was held in trust for them. In dismissing the counterclaim, the Court said:

"Both the deed for the Jersey City property and the deed for the West Hoboken property recite a money consideration, and the habendum is to the use of the mother, Elizabeth M. Brown.

"The amended answer and the counterclaim of the defendant pray for the reformation of the deeds in question so that they express a trust in favor of the defendants Ella Murray and William P. C. Brown, and that it may be decreed that William P. C. Brown and Ella Murray are sole owners of the Jersey City property and William P. C. Brown is the owner of the West New York property.

"[1, 2] I am of the opinion that no trusts can be established in favor of the defendants. Deeds were executed from the son to the mother for an expressed consideration—habendum to her use. Under the cases, therefore, the property became hers absolutely. Down

v. Down, 80 N. J. Eq. 68, 82 Atl. 322; Andreas v. Andreas, 84 N. J. Eq. 375, 94 Atl. 415; Sayre v. Lemberger, 92 N. J. Eq. 656, 114 Atl. 454."

The foregoing authorities show conclusively that there was no resulting trust in this case.

In their brief appellants correctly state the rule that in cases of fraud and mistake a trust may be impressed upon property even though the person seeking the relief has executed an absolute deed. However, as pointed out by the Chancellor in *Down v. Down*, *supra*, fraud and mistake are not elements of a resulting trust and in this case appellants did not claim relief on either of these grounds.

Clearly the trial court was right in holding that in view of their deed appellants could not establish a resulting trust in the real estate owned by the appellee and in sustaining appellants' motion for a summary judgment.

MORE TO FOLLOW

II. The Deed and Option Did Not Make Appellants Mortgagees in a Third Mortgage on the Property for \$6,000.

In this Court appellants place their main reliance upon cases in which absolute deeds accompanied by repurchase agreements are held to be mortgages (App. Br. 21-26). These cases need not be analyzed in detail. An absolute deed accompanied by a repurchase agreement does not constitute a mortgage unless it is clearly shown that the parties intended the conveyance to be nothing more than security for an obligation. *J. W. Pierson Co. v. Freeman* (N. J. Err. & App. 1933), 113 N. J. Eq. 268, 166 A. 121, 124. In all the cases discussed in appellants' brief the Court held that the evidence was sufficient to show that the conveyance was intended to be a mortgage. In every case cited, an absolute deed was reduced to the status of a mortgage and the grantor was put in the position of a mortgagor. Appellants take exactly the opposite position in this case. They claim that the deed and option here resulted in a mortgage in which the grantees in the deed

occupy the position of mortgagors and the grantors in the deed occupy the position of mortgagees.

On page 20 of their brief they say:

"It is very plain the parties would have effected their agreed intent that their transactions involved no gift by mortgaging the property for \$6,000 to appellants, and hence that appellants are substantially claiming that equity requires placement against appellees of an obligation to pay \$6,000 as secured by a lien upon the property."

And on page 21 of their brief they say:

"That the applicable property precedents in New Jersey and the District are the same may simplify consideration of the equitable relief allowable to appellants and the error of its denial. Both clearly indicate the option has the effect of a mortgage for \$6,000 by Fountain to Filson notwithstanding the Filson delivery of the absolute deed."

These quotations indicate that appellants admit, as they must in view of the record on this case, that the deed was an absolute conveyance of the property from the Filsons to the Fountains, and that their claim is that it is the option which constitutes the mortgage from the Fountains to the Filsons. This theory is in direct conflict with the express terms of the option which after giving the Filsons "first option for three years, from the date hereof, to repurchase the premises hereinafter described, for the sum of Nine Thousand (\$9,000.00) Dollars;" says:

"AND it is further Agreed between the Optionor and the Optionee, that this option may be terminated upon payment to the Optionee of the sum of Six Thousand (\$6,000.00) Dollars in cash or certified check;" (Def. Exh. No. 9, Jt. App. 59)

In order for this provision to amount to a mortgage it would have to both fix an obligation to pay the Fountains \$6,000 after the expiration of the option unexercised by either party, and, in some manner, pledge or convey some interest in the property to secure this obligation.

Obviously the option does neither of these things and so the appellants, if they are to prevail, must add to or vary its terms. This they clearly cannot do. In *Trenton Banking Co. v. Howard* (N. J. Ch. 1936) 187 Atl. 569, aff'd. 121 N. J. Eq. 85, 187 Atl. 575, the issue was the proper construction of a trust agreement in which the defendant, Mrs. Howard, was grantor and the plaintiff bank was trustee. The particular clause in dispute was one under which the grantor reserved "the right to add to or decrease said fund from time to time as she may desire." The grantor claimed that by this clause the bank had agreed that she could draw cash out of the trust at any time just as if she had put her money in a savings account. Subject to a later determination as to its competency and admissibility the Court received Mrs. Howard's testimony as follows: that the trust agreement was prepared by the bank; that the first agreement prepared contained no such clause as the one in question; that she refused to sign that agreement because it did not contain a clause enabling her to "put in or draw out"; and that thereupon the trust officer of the bank had another agreement drawn which added the disputed clause and assured Mrs. Howard and her husband that under the second agreement Mrs. Howard could add to or draw out at any time just as in the savings account. Mrs. Howard said that she signed the agreement on the basis of this representation.

The Court held that even if this evidence should be deemed entirely true and accurate and the statement taken to fully support Mrs. Howard's interpretation of the disputed clause it could not be received or considered in determining the rights of the parties because it was at variance with a written agreement which constituted the evidence as to what the parties had agreed to.

The testimony about the execution of the trust instrument in *Trenton Bank Co. v. Howard*, *supra*, is almost precisely the same as Filson's testimony about his execution of the option (Jt. App. 43, 44, 45). Clearly the rule

of *Trenton Banking Co. v. Howard*, *supra*, is applicable here and defeats appellants' attempt to vary the plain terms of the option agreement.³

III. The Court Lacks Jurisdiction of the Subject of the Action.

In the lower court the case was submitted on the basis of appellants' claim of a resulting trust, and although appellee's answer alleges as a defense that the Court is without jurisdiction of the subject matter (Jt. App. 6), this point was not argued in support of the motion for summary judgment. However, in this Court appellants appear to seek a declaration that the option agreement was a mortgage. While appellee believes that this position cannot be sustained for the reasons stated in the preceding section of this brief, yet if this Court should be of the opinion that the option agreement did not constitute a mortgage from the Fountains to the appellants, then the relief appellants are seeking is in reality foreclosure of the mortgage. The courts of the District of Columbia do not have power to decree foreclosure of a mortgage on land in New Jersey. *Columbia National Sand Dredging Co. v. Morton*, 28 App. D. C. 288 (1906).

IV. Substitution of the Administratrix of the Estate of Brainard Fountain Was Properly Denied.

Brainard Fountain, one of the original defendants in this suit, died after it was started. Appellants made a motion to have the administratrix of his estate substituted as a defendant (Jt. App. 10). Both parties concede that under the New Jersey law, the deed from the Filsons to the Fountains conveyed title to the property to Mr. and Mrs. Fountain by the entireties. As pointed out by appel-

³ The Court in *Trenton Banking Co. v. Howard*, *supra*, also held that the facts recited by Mrs. Howard would not entitle her to relief on the ground of fraud or mistake.

lants in their brief, when Mr. Fountain died the present appellee took nothing from him because at that time his interest in the property "simply ceased" (App. Br. 14). For this reason the Court below found that "the Administratrix of the Estate of Brainard Fountain, Deceased, has no interest in this action, and that the Defendant, Anna M. Fountain, now owns the whole of the title to said property;" (Jt. App. 13)

Obviously, if, as appellants claim, the property had been subject to a resulting trust in favor of appellants, the death of Mr. Fountain would neither relieve the property of the trust nor concern the administratrix of his estate in any way since the sole effect of the trust would be to qualify the title Mrs. Fountain had to the property after her husband's death.

It is, of course, equally obvious that if the motion for summary judgment should have been denied on the ground that appellants were entitled to go to trial on the question of whether Brainard Fountain had assumed a personal obligation to pay the Filsons \$6,000, his administratrix would have been a necessary party to the suit. *Commonwealth Trust Company v. Smith*, 266 U. S. 152, 45 S. Ct. 26, 69 L. Ed. 219 (1924).

V. In Any Event, Appellants Are Not Entitled to a Judgment In This Court.

Appellants appear to ask this Court to grant them the relief they seek in their complaint (App. Br. 26, 27), although they made no motion for judgment in the lower court. Entirely aside from this, however, it is clear that if appellants are entitled to any relief at all in this Court, which appellee denies, they are entitled only to have the case sent back to the District Court for a trial.

A motion for summary judgment can be granted only when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." F. R. C. P. 56(c). The appellee's position

is that the deed and option themselves entitle her to a judgment as a matter of law, the appellants not being able to establish either a resulting trust or a mortgage in their favor for the reasons heretofore stated. However, if appellee's position is not sound and other facts are material, then clearly there is a dispute as to many of them, and while, in that event appellants would be entitled to a trial, certainly the record as it stands does not make out for them the clear and convincing case which equity would require for a judgment in their favor.

For instance, if the deed and option do not by themselves determine this case, then one of the material facts is how much the value of the property exceeded the consideration paid for it. There is nothing in the record which shows how much the property was worth when it was conveyed to the appellee and her husband. Mr. Filson testified that he paid \$7,000 for the house and spent at least \$8,000 improving it (Jt. App. 46). Appellants assume throughout their brief that this is proof that after it was improved the property was worth \$15,000 although, of course, that is not necessarily true. Appellants also assume that the clause in the option agreement under which the Fountains could terminate the option by paying the Filsons \$6,000 is a recognition that the property was worth \$6,000 more than the \$9,000 worth of mortgages the Fountains assumed as consideration for the conveyance of the property to them. However, when his deposition was taken, Mr. Fountain said:

"I had no intention of exercising that portion of the contract. I didn't feel the house had that much equity in it." (Jt. App. 30)

Filson himself said that the house was "not my idea of a good investment." (Jt. App. 43). Later he added:

"I never said the property was a poor investment. I merely said from my angle it was no good for me. It was not an investment property, a private, one-family house. A single one-family house is never investment

property. A multiple-family house, yes; but that would not be my idea of an investment, where the taxes alone are \$480 a year." (Jt. App. 46, 47)

There are other bits of evidence which indicate a question as to the value of the property. For instance, the Fountains offered the house for sale in the summer of 1945 and contracted to sell it in August 1945 for \$15,600 (Jt. App. 20). We think the Court can take judicial notice that real estate values had risen substantially between December 1937 and August 1945. Furthermore, when Filson wanted to borrow \$3,000 in December 1937, he attempted to get the building and loan association to increase the loan on the house but was unable to do so (Jt. App. 38). Filson testified that he could not get the money because he was not living in the house and the policy of the building and loan association was not to lend money for investment purposes (Jt. App. 38). However, the record shows without dispute that Fountain was living in the house when Filson obtained the original loan of \$6,000 from the building and loan association in August 1937 (Jt. App. 37).

In addition, it appears that prior to the expiration of the option Filson made some efforts to sell the property. Filson said that he made these efforts on behalf of the Fountains (Jt. App. 41). However, it is clear that under the option the Fountains had nothing to gain from a sale of the property, except perhaps relief from the burden of the mortgages, unless they terminated the option by paying Filson \$6,000 and then were able to obtain more than \$15,000. On the other hand, it is clear that by contracting to sell the house and then exercising his option to repurchase the property, Filson could have gained or recouped any amount he could have obtained in excess of \$9,000.

Aside from the foregoing, many other facts are unsettled such as Filson's purpose in borrowing additional funds in December 1937 (Jt. App. 25, 38).

All such facts would be material if contrary to appellee's position the written instruments do not control the case.

Consequently, in no event are appellants entitled to anything more from this Court than an order sending the case back to the District Court for a trial.

VI. CONCLUSION.

This is a case in which the appellants claimed a resulting trust in New Jersey real estate. However, they had executed a deed for an express consideration which granted the habendum to the use of the appellee and her husband, as well as the legal title, and under the law of New Jersey, which is controlling, this clearly precluded the appellant from establishing a resulting trust. For this reason the Court below sustained appellee's motion for a summary judgment.

Although appellants reiterate their claim of a resulting trust in their brief in this Court, they seem to place their main reliance on a new theory. It is that the option agreement executed concurrently with the deed is in reality a mortgage from the appellee and her deceased husband to the appellants. However, to establish this theory appellants must vary or add to the express terms of the option and under the law of New Jersey this cannot be done. Since appellants cannot avoid the effect of the deed and option on either of the theories they have advanced, appellee must prevail as a matter of law and is entitled to an affirmance of the judgment in her favor.

Respectfully submitted,

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